



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: APRIL 24, 2023

IN THE MATTER OF:

Appeal Board No. 627476

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 627474, 627475 and 627476, the claimant appeals from the decisions of the Administrative Law Judge filed December 30, 2022, which sustained the initial determination holding the claimant ineligible to receive benefits, effective May 18, 2020 through January 17, 2021, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation as modified to exclude the week ending May 24, 2020 and the weeks ending September 20, 2020 through December 20, 2020; and sustained the initial determinations charging the claimant with an overpayment of \$7,039 in regular unemployment insurance benefits recoverable pursuant to Labor Law §

597 (4), \$3,600 in Federal Pandemic Unemployment Compensation (FPUC) benefits recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and \$603 in Pandemic Emergency Unemployment Compensation (PEUC) benefits recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 208 effective days and charging a civil penalty of \$1,686.30 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified in accordance with the decision.

In Appeal Board Nos. 627474, 627475 and 627476, the claimant also appeals from the decisions of the Administrative Law Judge filed December 30, 2022, which sustained the initial determination holding the claimant ineligible to receive benefits, effective January 18, 2021 through August 15, 2021, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation as modified to exclude the week ending June 27, 2021;

and sustained the initial determinations charging the claimant with an overpayment of \$9,000 in Federal Pandemic Unemployment Compensation (FPUC) benefits recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and \$7,035 in Pandemic Emergency Unemployment Compensation (PEUC) benefits recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by zero effective days and charging a civil penalty of \$2,405.25 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified in accordance with the decision.

At the combined telephone conference hearing before the Administrative Law Judge, testimony was taken. There were appearances on behalf of the claimant, the employer and the Commissioner of Labor.

The Board considered the arguments contained in the written statement submitted by the claimant.

Our review of the record reveals that the case should be remanded to hold a hearing. The record was not sufficiently developed on the determination of lack of total unemployment and the associated issues. The parties should have another opportunity to submit additional testimony and other evidence on these issues.

On the date of the hearing, the casefile contained the claimant's redacted bank records showing highlighted deposits which were possibly from this employer. One appears to be a deposit of \$887.32 on July 24, 2020. The documents which became Hearing Exhibit 5 include a list of the bi-weekly amounts paid to the claimant. One entry is \$1,267.20 paid on July 24, 2020, with an earn date of July 18, 2020. The documents which became Hearing Exhibit 7 include what appears to be another employer record of the July 24, 2020 payment (it is labeled "EMP EXH 7"). It shows that the net pay is \$887.32. Significantly, however, also in the casefile on the date of the hearing is an EStub for the "7/24/2020" payment with a net pay of \$422.97, and \$496.90 gross pay for the period of "6/28/2020 to 7/11/2020", which demonstrates a discrepancy in the employer's records. The claimant contends this discrepancy and that the information from the employer on her earnings has been unreliable and confusing. Also, "EMP EXH 7" states the claimant's hourly payrate was \$93.75. The record contains no evidence that this was the claimant's pay rate that year.

The claimant, if possible, should print and submit for inclusion in the record all additional EStubs for the relevant period.

The claimant is to be asked to state whether her statement on appeal accurately and completely sets forth her contentions. It, with its attachments, is to be entered into the record in the usual manner. The Commissioner of Labor's representative and the employer are to be given the opportunity to cross-examine the claimant on her contentions and this evidence. The claimant's bank statements are to be entered into the record along with all the EStubs.

The Judge shall expand the record to establish whether any of the documents which became Hearing Exhibits 5 and 7 and the ones attached to the statement, and any additionally submitted EStubs are business records and a full discussion regarding the discrepancies in them. The Judge is to inquire into the claimant's hourly rates in 2019, 2020, 2021 and 2022; how and when the claimant was advised of each hourly rate for 2020 and 2021; the payment formula the employer used in 2019; whether and if so when it changed to a different payment formula, and how and when the claimant was advised of the change; and whether during 2020 and 2021, the claimant had proximate access to paper or electronic records of her gross and net periodic payments or if the claimant could call or e-mail the employer for this information and how and when the

claimant was advised of this. The Judge shall also inquire into whether the claimant had paid or unpaid office hours in 2019; whether this changed in any way in 2020 and 2021 and how and when the claimant was advised of this. The claimant is to state the number of days she worked weekly in the session starting on June 20, 2020.

The initial determination states the claimant is ineligible for benefits because she worked two days, earning over \$504 for the statutory weeks ending August 9, 2020 and August 16, 2020, with associated overpayments and willful misrepresentations. In light of the previously noted discrepancies, the Judge's decision is to take into account the interplay between the initial determinations and the terms and the statutory weeks. For example, the Judge's decision found that the term ended on August 8, 2020 (in the statutory week ending August 9, 2020), and the claimant did not work again until in the session beginning Saturday September 12, 2020. This must be factored into the

initial determination's stated ineligibility for the week ending August 16, 2020. It is noted that the Judge's decision found the claimant did not work in the weeks ending August 9, 2020; March 7, 2021 and April 14, 2021 and, for example, that she was paid \$1,584 for the period of, "February 28 through March 13, 2021".

In the discretion of the Administrative Law Judge further relevant testimony and evidence may be received. This is to include into any pay lag and when the claimant was paid for the work she performed.

Now, based on all of the foregoing, it is

ORDERED, that the decisions of the Administrative Law Judge, except for the modification to exclude the weeks ending May 24, 2020, the weeks ending September 20, 2020 through December 20, 2020, and the week ending June 27, 2021 and the associated modifications in the recoverable overpayments and willful misrepresentations initial determinations, be, and the same hereby are, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues of lack of total unemployment, recoverable overpayments and willful misrepresentations with civil penalties, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render new decisions, on the issues of lack of total unemployment, recoverable overpayments and willful misrepresentations with civil penalties, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law. The weeks ending May 24, 2020, the weeks ending September 20, 2020 through December 20, 2020, and the week ending June 27, 2021 and the associated modifications in the recoverable overpayments and willful misrepresentations initial determinations are not before the Judge.

JUNE F. O'NEILL, MEMBER